



IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. **77-2094**

ROBERT DOUGLAS WATKINS,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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SUBJECT INDEX

	Page
TABLE OF AUTHORITIES	ii
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED FOR REVIEW	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
SUMMARY OF THE ARGUMENT	4
ARGUMENT	
FATAL VARIANCE BETWEEN INDICT- MENT AND PROOF	5
RIGHT TO SPEEDY TRIAL	8
PRAYER	11
CERTIFICATE OF SERVICE	12
APPENDIX:	
Opinion of Fifth Circuit Court of Appeals	1a
Order of Fifth Circuit Denying Motion for Rehearing	32a
Motion for Stay of Mandate	33a
Stay of Mandate by Fifth Circuit	36a

TABLE OF AUTHORITIES

Cases:	Page
Ex parte Pickerill, (1942), 44 F.Supp. 741	9
Gilstrap v. Goodwin, (1974), 386 F.Supp. 1013	10
Kotteakos v. U.S., (1946), 328 U.S. 750	7
U. S. v. Perez, (1973), 489 F.2d 51	4,7
<i>Other Authorities:</i>	
Constitution, Amendment 5	2
Constitution, Amendment 6	3,9,10
18 U.S.C. § 1341	5

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OPINIONS BELOW

THE OPINION OF THE COURT OF APPEALS
BELOW IS SET FORTH IN THE APPENDIX. THE
OPINION OF THE DISTRICT COURT BELOW WAS
NOT REPORTED.

JURISDICTION

- (i) The judgment of the Court below was entered on the 9th day of June, 1977.
- (ii) Timely Petition for Rehearing was filed and it was denied on July 8, 1977.

- (iii) This Court has jurisdiction to review the judgment of the Court of Appeals for the Fifth Circuit by writ of certiorari pursuant to Title 28, U.S.C. Section 1254(i).

QUESTIONS PRESENTED FOR REVIEW

WHETHER A VARIANCE EXISTED BETWEEN THE INDICTMENT CHARGING A SINGLE CONSPIRACY AND THE PROOF OF TWO CONSPIRACIES.

WHETHER PETITIONER WAS DENIED THE RIGHT TO A SPEEDY TRIAL CONSISTENT WITH THE PRINCIPLES OF THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

CONSTITUTIONAL AND STATUTORY PROVISIONS

CONSTITUTION, AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

CONSTITUTION, AMENDMENT 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.

STATEMENT OF THE CASE

On April 11, 1974, a 13-count mail fraud and conspiracy indictment was returned naming Petitioner and others. Trial was set for June 10, 1974, but the date was passed to allow the Grand Jury to return a superceding indictment. The new indictment (which differed from the original indictment only as to the number of counts under which certain defendants were charged) was handed down on June 26, 1974.

Counts 1 through 12 of the indictment named various defendants as actors in perpetrating the alleged fraud against specific prospective dealers, either by using the mails to send them contracts or by causing them to use the mails to send their repayment checks to Diversified Marketers, Inc. or ICU Corporation. Count 13 alleged a conspiracy to conduct the fraudulent scheme by mail.

Trial was set for December 16, 1974, but was postponed when Kochs suffered a heart attack on December 14.

Van Note pleaded guilty to Count 1 of the indictment and, after sentencing, was dismissed from the cause on September 29, 1975.

Trial was set for December 1, 1975, but docket and witness complications caused its postponement until

January 26, 1976. Kochs was severed from the cause due to his continuing heart ailment. He was too ill to appear at trial and died shortly afterward.

On February 6, 1976, the jury returned verdicts of guilty against Petitioner and the three remaining defendants.

SUMMARY OF THE ARGUMENT

The Court of Appeals summarily dismissed Petitioner's argument that there was a fatal variance between the indictment and the proof as being without merit. It offered no explanation but cited *United States v. Perez*, 5 Cir., 1973, 489 F.2d 51, 62, cert. denied, 417 U.S. 945, 94 S.Ct. 3067, 41 L.Ed. 664 (1974).

This conclusion by the Court of Appeals cannot stand. It ignores the proof of two separate and distinct conspiracies and views them as a single conspiracy as alleged in the indictment.

The Petitioner would show that the delay of 21½ months between the indictment and the date of trial was a denial of his constitutional guarantee of a speedy trial, created an unnecessary hardship upon Plaintiff both personally and financially, caused him to lose communication with a witness with whom he considered material to his defense and seriously impaired his ability to properly defend his position at the trial of the cause.

ARGUMENT

I. Fatal Variance Between Indictment and Proof

Petitioner would show that a variance existed between the indictment charging a single conspiracy and the proof which revealed distinct conspiracies.

Todd Van Note, Charlie Sheppard and Howard Eugene Mason incorporated Diversified Marketers, Inc., or DMI, on July 21, 1971. Defendant Watkins became vice-president of DMI and defendant Chambers sales manager.

According to Van Note's testimony, the purpose of the company was to sell automotive filters through a network of consignment dealers.

ICU Corporation was formed on February 11, 1972. Van Note, Watkins and Chambers were the incorporators. Chambers was president and Watkins was vice president. ICU was operated as a consignment dealership program. The products involved were different — oil additives, automotive waxes and polishes, and other products, instead of filters.

Count 13 of the indictment under which Petitioner was convicted alleges a conspiracy in violation of 18 U.S.C. § 1341 in the following language:

1. Prior to on or about July 17, 1971, and continuing thereafter until on or about November 1, 1972, the exact dates being to the Grand Jury unknown, the defendants TODD VAN NOTE, ROBERT DOUGLAS

WATKINS, DONALD BYRD CHAMBERS, GERALD THATCHER, WILLIAM NETTERVILLE, and O. B. KOCHS, in the Northern District of Texas and elsewhere, did knowingly, wilfully, and unlawfully conspire, combine, confederate and agree among themselves, with each other, and with other persons to the Grand Jury unknown, to commit certain offenses against the United States, to-wit: to wilfully and knowingly use and cause the mails to be used in execution of a scheme and artifice to defraud. A violation of Title 18, United States Code, Section 1341.

2. All of the allegations contained in the preceding 12 counts of this indictment are hereby realleged and are incorporated in this count as fully as if they were repeated herein, and each and all of the said acts of each and all of the defendants so described are designated as Overt Acts of said defendants, done in pursuance of and to effect the objects of the conspiracy, and in addition thereto, the defendants, in performance of said conspiracy and to effect the objects thereof, did commit the following described separate Overt Acts:

Although the indictment alleged a single conspiracy, the evidence adduced in the trial of this case proved, as was noted in the opinion of the Court of Appeals, two separate and distinct operations. If the conspiracy was proved, then the proof was the existence of two conspiracies, to-wit:

- (1) An operation in which the Petitioner was an employee working for a corporation called Diversified Marketers, Inc., whose business purpose was to sell automotive filters through consignment dealers.
- (2) A subsequent undertaking of ICU Corporation, a company in which Petitioner was an incorporator and officer whose business purpose was the marketing of oil additives, waxes and polishes.

The proof adduced in the trial of the cause was that two companies were engaged in the marketing of different products. The selling operations conducted by Diversified Marketers, Inc. preceded the operations of ICU Corporation. Petitioner would show that the variance between the indictment and the proof substantially affected his rights in the trial of this cause. This Court has held that such a variance is fatal. *Kotteakos v. United States*, 1946, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557.

The Court of Appeals summarily dismissed Petitioner's argument that there was a fatal variance between the indictment and the proof as being without merit. It offered no explanation but cited *United States v. Perez*, 5 Cir., 1973, 489 F.2d 51, 62, cert. denied, 417 U.S. 945, 94 S.Ct. 3067, 41 L.Ed.2d 664 (1974).

The indictment did not name two of the original incorporators, of DMI, to-wit: Charlie Sheppard and Howard Eugene Mason. Accordingly, the "hub" test advanced in the *Perez* opinion, cited by the Court of Appeals, will not stand. In this case the "hub" of the two separate operations was not the same.

A simple test to determine whether only one conspiracy existed, or more than one conspiracy existed is to determine whether the government could, if it elected, return an indictment on one conspiracy without including the other conspiracy in such an indictment. If it could, then no amount of legal jargon or fictional analogy can refute the fact that two or more conspiracies are in existence.

In this case it is clear that the government could have returned two indictments, one on the alleged DMI conspiracy and one on the ICU Corporation conspiracy, and should have done so.

This conclusion by the Court of Appeals cannot stand. It ignores that proof of two separate and distinct conspiracies and view them as a single conspiracy as alleged in the indictment.

II. Constitutional Right To a Speedy Trial

Appellant was indicted April 11, 1974 and arraigned May 3, 1974. The case was set for trial on June 10, 1974. Trial was postponed by the prosecution for the purpose of obtaining a re-indictment of the defendants. The defendants were arraigned September 27, 1974 and the case was set for trial December 16, 1974. The case was continued and re-set for December 1, 1975, passed again and finally set for January 26, 1976 when it was tried.

Petitioner has alleged that as a result of the undue lapse of time between the date of the indictment and the date of the trial when coupled with the prior period of impending indictment that his domestic affairs

debilitated, and as a result, his wife obtained a divorce during the period between the indictment and trial. The state of affairs brought about by the delay of trial, the unhappy state of his domestic affairs and his weakening financial position resulted in a complete demoralization of his life for the period of delay and thoroughly impaired his ability to prepare for his defense.

In the deteriorating circumstances, the accused lost contact with a witness, to-wit: Kennedy, former president of First Security Bank and Trust, the corporation by which he was employed, did business. His inability to contact and produce Kennedy as a witness was brought on by the undue delay of the trial of this matter. The accused asserts and believes that the testimony of Kennedy would have materially improved his position at the trial and would have cast an entirely different view upon his association in the conspiracy. His inability to produce the witness had a direct bearing upon his condition and was a direct result of the undue and unnecessary delay of the prosecution in bringing this case to trial.

The purpose of constitutional provision entitling accused to "speedy trial" is not solely to obtain accused's release from imprisonment in event of acquittal, but also to obtain release from harassment of a criminal prosecution and anxiety attending it and to prevent loss of witnesses which might result from long delay. Every person charged with an offense has a legal right to speedy settlement of charge that is asserted against him. U.S.C.A. Const. Amend. 6. *Ex parte Pickerill*, 44 F.Supp. 741 (D.C.Tex. 1942).

Speedy trial provisions of constitution and rules seek to prevent lengthy pretrial imprisonment where accused is unable to make bail, or pretrial restriction of movement when bail is available, to minimize anxiety and attendant evils which are invariably visited upon one under public accusation but not tried, and to insure that ability of accused to answer charge will not be impaired on account of lost witnesses and faded memories due to passage of time. U.S.C.A. Const. Amend. 6; Fed. Rules Crim. Proc. rule 48(b), 18 U.S.C.A.

Petitioner would show that this delay of twenty-one and one-half (21½) months between the date of indictment and date of trial seriously impaired his ability to properly prepare and present his defense of the accusations made against him and effectively deprived him of the Sixth Amendment right to a speedy trial. U.S.C.A. Const. Amend. 6. It has been held that a delay of twenty-three (23) months between the return of the indictment and trial would presumptively result in prejudice from failure to accord Defendant a speedy trial. *Gilstrap v. Goodwin*, 386 F.Supp. 1013, D.C.Va. 1974.

The delay of 21½ months, between the date that trial was first set and the date of the final trial, was sufficient delay to prejudice the rights of the accused and to impair his defense. For these reasons, it is respectfully requested that a Writ of Certiorari be granted.

PRAYER

For the foregoing reasons, the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

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Wayne Hancock
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CERTIFICATE OF SERVICE

All parties required to be served with copies of the Petition for Writ of Certiorari have been served. Three copies of the Petition for Writ of Certiorari were served upon the Solicitor General by depositing same in a United States mail box, with air mail postage prepaid, addressed to Solicitor General, Department of Justice, Washington, D.C. 20530, on the ____ day of August, 1977. One copy of the Petition for Writ of Certiorari was served upon the United States Attorney by depositing same in a United States mail box, with first class postage prepaid, addressed to Judith A. Shepherd, Assistant United States Attorney, Room 16G28, Federal Building, 1100 Commerce Street, Dallas, Texas 75242 on the ____ day of August, 1977.

WAYNE HANCOCK

APPENDIX

UNITED STATES of America,
Plaintiff-Appellee,

v.

William NETTERVILLE, Gerald L. Thatcher, Robert
Douglas Watkins, and Donald Byrd Chambers,
Defendants-Appellants.

No. 76-1670.

United States Court of Appeals,
Fifth Circuit.

June 9, 1977.

Appeals from the United States District Court for
the Northern District of Texas.

Before COLEMAN, AINSWORTH and INGRAHAM,
Circuit Judges.

AINSWORTH, Circuit Judge:

This criminal case involves a 13-count conspiracy indictment against several defendants charging violations of 18 U.S.C. § 1341,¹ relative to use of the

¹ The text of 18 U.S.C. § 1341 follows:

Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses,

United States mails to defraud. The present appellants, Robert Douglas Watkins, Donald Byrd Chambers, Gerald Thatcher and William Netterville, and others, were charged in the indictment with use of the mails in the execution of a scheme to defraud and obtain money by means of false pretenses from persons induced to purchase oil products dealerships. The jury returned verdicts of guilty on at least some counts against each of the four appellants. Their appeal contends that the evidence at the trial was insufficient for the jury to find a conspiracy; that the evidence was insufficient to support convictions on various substantive counts; that they were denied their right to speedy trial; and other errors. We find these assertions to be without merit and affirm the judgment below.

Todd Van Note, Charlie Sheppart and Howard Eugene Mason incorporated Diversified Marketers, Inc., or DMI, on July 21, 1971. Defendant Watkins became vice president of DMI and defendant Chambers sales manager.

According to Van Note's testimony, the purpose of the company was to sell automotive filters through a

representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

network of consignment dealers. To acquire dealers DMI placed classified ads in newspapers. Interested potential dealers were to call a Dallas telephone number, at which they reached the DMI offices. Callers were told that they would be contacted by a salesman; the home office would then refer the names of the callers to salesmen in the field, who would contact the callers personally. The presentations made by the salesmen were based upon promotional materials including a sales manual compiled by Van Note and Chambers.

Several prospective dealers who were given the sales presentation appeared as witnesses at the trial. According to their testimony the salesmen represented that for about \$3,000 paid in advance they would be granted a dealership, that inventory would arrive within three to six weeks, and that fifteen (sometimes more) retail locations would be arranged for them. Should a dealer become dissatisfied, DMI guaranteed to buy back any unsold inventory at a small discount. The sales manual contained a list of allegedly successful dealers whom the prospect could contact by telephone. Among the names listed was that of "Don Mason." The telephone number listed for "Mason" actually reached defendant Netterville, who played the part of the fictitious dealer and made what one witness described as "quite enthusiastic" false claims concerning the success of his "distributorship." Several witnesses testified that calls which they made to such numbers provided by salesmen were influential in their decisions to apply for dealerships.

Prospective dealers who were persuaded by the sales presentation would sign dealership agreements,

and execute checks as advance payment. The signed agreements and checks would be sent, often by mail, to DMI in Dallas. Watkins would evaluate and "accept" the new dealer, execute a contract and repurchase agreement, and mail these and a welcoming letter back to the new dealer.

The money received from new dealers was supposed to be used to purchase and ship inventory and sales materials, and to establish retail locations for the new dealer, according to Van Note's testimony. Instead the money was used to pay the day-to-day operating expenses of DMI (and later of ICU). By February of 1972, however, DMI "reached a point where our overhead was ahead of our income," Van Note testified. When cash could not be raised through bank loans or through individual investors, it was decided, upon Chambers' suggestion, to form a new corporation which could provide cash. Accordingly, ICU Corporation was formed on February 11, 1972. Van Note, Watkins and Chambers were the incorporators. Chambers was president and Watkins was vice president. ICU was operated as a consignment dealership program similar to DMI except that the products involved were different — oil additives, automotive waxes and polishes, and other products, instead of filters. Van Note testified that Chambers was "basically in charge of putting the packet together" for ICU's promotion and sales.

At about the time ICU was being formed DMI retained Jack Howard and Associates, a Dallas advertising firm, to assist in recruiting new dealers. Roy Stamps, who handled the account for Howard, testified that between January and August of 1972 DMI and ICU

spent about \$190,000 on advertising for new dealers. He testified that Chambers, Watkins and Van Note participated in preparing the ads, and that Van Note had final say. The ads were placed in newspapers "in almost every state in the Union," Stamps testified. A typical DMI newspaper ad which appears in the record said:

DISTRIBUTOR NEEDED. Be in business for yourself, full or part time, for twenty one year old auto products company. No direct selling. Service dealers only. Economy does not affect our business. Profit potential is extraordinary. Inventory secured with a guaranteed buy-back. Phone collect, Mr. Peters, area code 201-343-7771.

A similar ad for ICU described that company as sixty years old. Stamps testified that he felt these descriptions to be ethical even though the two companies were each less than one year old, because the products which they distributed bore trademarks or copyrights which were respectively 21 and 60 years old.

As early as December of 1971 DMI was experiencing "backlogging" difficulties in the shipment of promised merchandise to dealers, according to the testimony of one employee. By February of 1972 the two corporations were making agreements which they were unable to honor; merchandise was in some cases not shipped and the buy-back agreements were not honored. After "acceptance" new dealers began to be advised by letter that DMI had "filled its quota" of new dealers and that no additional dealers would be employed; the prepayments made by such dealers were in many cases not returned. Nevertheless, DMI

and ICU continued to solicit new dealers — Stamps testified that he was doing business amounting to \$5,000 to \$6,000 weekly with the DMI/ICU account — and to enter into additional agreements with prospective dealers until August of 1972. The corporations continued to encourage and to attempt to mollify its dealers, often by letter, until as late as October, 1972. Some dealers received small amounts of their investment back, and others received nothing.

On April 11, 1974, a 13-count mail fraud and conspiracy indictment was returned naming Van Note, Oliver B. Kochs, and the present appellants. Trial was set for June 10, 1974, but the date was passed to allow the grand jury to return a superceding indictment. The new indictment (which differed from the original indictment only as to the number of counts under which certain defendants were charged) was handed down on June 26, 1974. The elements alleged as false or fraudulent in the indictment included the representation as to the ages of the companies, the agreement to repurchase, the guarantee of locations, the promise to deliver merchandise within three to six weeks, claimed profit expectancy of \$90 per day (included in some ads but not all), and the use of Kochs and "Mason" as bogus established dealers or "singers." Counts 1 through 12 of the indictment named various defendants as actors in perpetrating the alleged fraud against specific prospective dealers, either by using the mails to send them contracts or by causing them to use the mails to send their prepayment checks to DMI or ICU. Count 13 alleged a conspiracy to conduct the fraudulent scheme by mail.

Trial was set for December 16, 1974, but was postponed when Kochs suffered a heart attack on December 14.

Van Note pleaded guilty to Count 1 of the indictment and, after sentencing, was dismissed from the cause on September 29, 1975.

Trial was set for December 1, 1975, but docket and witness complications caused its postponement until January 26, 1976. Kochs was severed from the cause due to his continuing heart ailment. He was too ill to appear at trial and died shortly afterward.

On February 6, 1976, the jury returned verdicts of guilty against each of the four remaining defendants. All were found guilty on Count 13, the conspiracy count. Watkins was convicted on 10 substantive counts alleging mail fraud. Chambers was found guilty on one of five substantive counts in which he was named. Netterville was found guilty on both substantive counts naming him, and Thatcher on five of seven. Watkins was sentenced to a total of eight years' imprisonment; Chambers received two concurrent five year terms; Thatcher received a total of seven years, and Netterville received three concurrent five year terms. All four appeal their convictions.

On appeal each of the appellants complains that he was denied a speedy trial. Each challenges the sufficiency of the evidence relating to the conspiracy count and to the substantive counts on which he was convicted. Thatcher and Netterville assert that an erroneous instruction as to intent was given to the jury. Thatcher and Watkins complain of admission of evidence of allegedly extraneous offenses. Chambers contends that certain conduct by the prosecutor during the trial was prejudicial. We find all of these points of error to be meritless.

The conspiracy count

In order for us to sustain appellants' convictions for conspiracy, the proof must be sufficient to show that two or more persons conspired for an illegal purpose. The illegal purpose alleged by the government in this case is mail fraud; the elements of mail fraud are a scheme to defraud, and use of the mails in execution of the scheme. Altogether, the proof must show a conspiracy to defraud, in execution of which the mails are used. As seen below, the proof was adequate to satisfy each of these elements.

When the sufficiency of the evidence to convict is challenged, we must sustain the guilty verdict if it is supported by substantial evidence taking the view most favorable to the government. *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1944). "The essential elements of a conspiracy are an agreement by two or more persons to combine for an illegal purpose and an overt act by one member in furtherance of the agreement," *United States v. Lowry*, 5 Cir., 1972, 456 F.2d 341, 344; see 18 U.S.C. § 371. Direct proof of the agreement is not required. As we have said,

Since a conspiracy by its very nature is born and clothed in secrecy, the first element of the offense — agreement — is seldom susceptible of direct proof. Proof of the agreement or common purpose therefore must rest upon inferences drawn from relevant and competent circumstantial evidence — ordinarily, the acts and conduct of the conspirators themselves.

United States v. Warner, 5 Cir., 1971, 441 F.2d 821, 830, cert. denied, 404 U.S. 829, 92 S.Ct. 65, 30 L.Ed.2d 58 (1971).

That the four appellants associated in a single scheme involving DMI and ICU is clear from the facts. Van Note operated DMI; he hired Watkins and Chambers; Chambers hired Netterville and Thatcher with Van Note's approval. Van Note, Chambers and Watkins incorporated ICU. Thatcher worked for both companies. Netterville pretended to be "Don Mason" for callers interested in dealerships with both companies.

The illegal purpose alleged by the government is mail fraud under 18 U.S.C. § 1341. "The essential elements of an offense under the mail fraud statute are '(1) a scheme to defraud, and (2) the mailing of a letter, etc., for the purpose of executing the scheme.' *Pereira v. United States*, 347 U.S. 1, 8, 74 S.Ct. 358, 362, 98 L.Ed. 435 (1954)." *United States v. Melvin*, 5 Cir., 1977, 544 F.2d 767, 773. The statute "condemns any scheme to defraud in which the mails are employed," *id.*

In order to constitute a "scheme to defraud" the scheme must be shown to be

reasonably calculated to deceive persons of ordinary prudence and comprehension. The intent of the crime is shown by the scheme itself — here, the active promotion of a company known to be inescapably insolvent by making impossible representations of possible wealth to potential investors, . . .

United States v. Bruce, 5 Cir., 1973, 488 F.2d 1224, 1229, cert. denied, 419 U.S. 825, 95 S.Ct. 41, 42 L.Ed.2d 48 (1974) [emphasis in the original].

In the present case, the classified advertising used by DMI and ICU to attract prospective dealers is false in some respects and in others so misleading as to amount to a falsehood. Ads promising that all inventory would be "secured" by the buy-back guarantee continued to run until August, 1972, although no buy-back guarantee was honored after January of 1972, according to Van Note. The ads promised delivery of inventory within a certain time, as short as three to six weeks, but Van Note testified that as early as January of 1972 DMI was having "difficulties" supplying inventory; several witnesses testified that they received no inventory at all. The ads promised that retail locations would be arranged, but dealers who appeared as witnesses testified that they received no locations and no effort was made to arrange locations for them. The ads referred to "extraordinary" profit potential, but there is no indication that any experience existed on which such a claim could be based. Finally, the ads represented that DMI was 21 years old and ICU was 60 years old. We need not decide whether, as Stamps testified, these assertions were "ethical" in light of the age of the trademarks or copyrights securing the products being sold. These representations as to the ages of the companies give the unmistakable impression that the other claims in the ads are based upon decades of dealer experience, while in truth the claims were baseless, as we have seen. Thus, the representations as to the ages of the companies in conjunction with the balance of the matter in the ads were

grossly misleading. Taking all of these factors together we find that the ads were false. Intent to deceive can be inferred from the fact that the ads continued to run months after DMI and ICU had ceased honoring the promises made in the ads, and after they had lost the ability to honor the agreements due to insufficient cash flow. The jury could correctly find, therefore, that the ads were part of a scheme to defraud under section 1341.

The buy-back guarantee already discussed was repeated by salesmen in personal presentations to prospective dealers, and a memorandum of the agreement was executed at company headquarters and returned to the new dealers. In light of what has already been said concerning the buy-back agreement and in light of the emphasis placed upon it by the companies in recruiting new dealers, the buy-back agreement could correctly have been found to be part of a scheme to defraud.

In addition to the buy-back agreement, other portions of the salesmen's presentation were false. For example, the presentations included representations that DMI had 300 successful distributors, that earnings of \$25,000 per year were assured, and that profits could amount to 55 cents on the dollar. False representations made in the classified ads as to arrival time of inventory, guaranteed retail locations, and that the companies would provide a lifetime bookkeeping system were repeated by the salesmen. In this manner prospective dealers were intentionally deceived into believing that they were dealing with established companies which would take steps to reward their investments and to keep their investments secure. The

jury could correctly find that the salesmen's presentations were a part of a scheme to defraud.

Included in at least some of the presentations, and available in the sales manuals, were names and telephone numbers which prospective dealers were told were those of successful dealers; prospective dealers were invited to contact them to discuss the investment. In fact, at least two of these "established dealers" were bogus. One, "Don Mason," did not exist at all. His telephone number reached Netterville, who identified himself as "Mason" and made extravagant, false claims for the success of the "Mason" dealership. The other was Kochs; Kochs was a real person but, as his affidavit shows, he was never a DMI or ICU dealer. He was hired to represent himself as a successful dealer. We conclude that the jury could find from the evidence that the intentional deception of prospective dealers concerning the success of the "Mason" and Kochs dealerships was part of a scheme to defraud.

In sum, the jury correctly found that in using false representations to recruit new dealers, and in making agreements with the new dealers which they would be unable to fulfil, the operators of DMI and ICU were conducting a scheme to defraud.

The mails were employed as "an integral part of the scheme to defraud," *United States v. Melvin, supra*, 544 F.2d at 775. Many prospective dealers' checks and signed agreements were mailed to DMI or ICU. Executed dealership contracts, buy-back agreements

and letters of welcome were mailed from DMI and ICU to new dealers. After the scheme began to collapse, mollifying letters and other assurances were mailed to dealers; see *United States v. Maze*, 414 U.S. 395, 403, 94 S.Ct. 645, 650, 38 L.Ed.2d 603 (1974).

From the foregoing the jury correctly found that the DMI and ICU consignment dealership operations constituted a conspiracy to obtain money by means of false or fraudulent representations or promises, by using or causing the mails to be used — in other words, a mail fraud conspiracy according to the terms of section 1341.

Watkins' argument that the DMI/ICU scheme constituted not one but two conspiracies so that a fatal variance exists between the indictment and the proof is without merit. See, e. g., *United States v. Perez*, 5 Cir., 1973, 489 F.2d 51, 62, cert. denied, 417 U.S. 945, 94 S.Ct. 3067, 41 L.Ed.2d 664 (1974).

Having established to the jury's satisfaction the elements of a mail fraud conspiracy, it remained for the government to adduce evidence to show each of the appellants' "knowing participation" in the conspiracy. *United States v. Oliva*, 5 Cir., 1974, 497 F.2d 130, 133. "Proof of agreement in conspiracy trials must usually rest on the inferences to be drawn from circumstantial evidence," *id.* at 134; see *United States v. Warner, supra*, 441 F.2d at 830. The "necessary agreement to commit criminal acts" must be shown by something more than "mere proof of association with one 'bad man,'" *United States v. Oliva, supra*, 497 F.2d at 134. See *United States v. Owen*, 5 Cir., 1974, 492 F.2d 1100, 1103-09, cert. denied, 419 U.S. 965, 95 S.Ct. 227, 42

L.Ed.2d 180 (1974). "In this circuit only slight evidence is required, for purposes of appellate review of conspiracy cases, to connect a particular defendant with a conspiracy, once the conspiracy is shown." *United States v. Binetti*, 5 Cir., 1977, 547 F.2d 265, 267. That evidence must show that the defendant wilfully associated himself with the criminal venture, participated in it, and sought by some act to make it succeed. *Id.*, at page 267.

Watkins, hired by Van Note in "August or September" of 1971, was described by Van Note as his "right arm." Watkins was vice president of both companies and an incorporator of ICU. It was Watkins who approved the new dealers' contracts and buy-back agreements and mailed them to the dealers with an encouraging letter. He was responsible for arranging shipment of merchandise to DMI and ICU dealers. He was contacted in person by dissatisfied dealers. Because of his involvement in accepting new dealers and in shipping merchandise, he could not escape knowing that the DMI and ICU contracts were not being honored. Watkins testified that he was aware of the companies' difficulties in meeting their obligations concerning merchandise in the late spring of 1972; and that he was aware that merchandise was not being shipped to some dealers because the companies lacked the necessary funds. Nevertheless, he continued to approve additional dealer contracts and buy-back agreements as late as August of 1972. Enough has been said to show that "the defendant's actions here went beyond mere association," *United States v. Binetti*, *supra*, at page 268, and provided a basis for the jury to find that Watkins knew of the scheme to defraud and wilfully acted in a manner calculated to make it succeed, *id.*

Chambers was hired by Van Note at about the same time as Watkins. As sales manager at DMI, Chambers hired the salesmen and furnished them with the material for their sales presentations, including the names of bogus "successful dealers." Chambers was instrumental in formulating the false and misleading advertising discussed earlier, according to Stamps. It was Chambers who suggested the formation of ICU and Chambers who prepared the promotional materials for that company. Van Note testified that Chambers knew that DMI was behind in meeting its commitments to dealers as early as January, 1972. He further testified that it was because there was insufficient cash flow to meet overhead that Chambers suggested forming ICU. Chambers' actions clearly went beyond "mere association", and the jury correctly found that he knew of the scheme and actively furthered it.

Thatcher was hired to be a salesman for DMI; later he became sales manager for ICU. As a salesman he "sold" three new dealers who appeared as witnesses; each testified that he made the false promises and representations to them which are discussed above. Thatcher recruited several of the bogus "successful dealers" whose telephone numbers he and other salesmen gave to prospective dealers. Checks payable to "Don Mason" were deposited to Thatcher's bank account. Again, the jury correctly concluded that Thatcher must have known of the scheme and actively furthered it.

Netterville asserts that he was recruited by Van Note to manage the "Don Mason Service Company" which was to serve as a distributorship for the Dallas-

Fort Worth area. While the Don Mason company was being organized, Van Note asked Netterville to answer a certain telephone, and to give any telephone callers certain information concerning the success of the Don Mason operation. Netterville testified that he was provided with information to read, and that he simply read it having no way of knowing whether it was true or false. Witnesses testified, however, that Netterville represented himself as Mason when called, and played the part with "enthusiasm." Another witness, a postal inspector who interviewed Netterville in connection with this case, testified that Netterville told him that he told callers about money and sales which he anticipated making. Netterville, then, understood that he was deceiving the people who telephoned him. Netterville introduced at least one prospect, Lynn Rountree, to Van Note. Rountree bought a "double" dealership. The jury could correctly infer that Netterville understood from the nature of the calls and the content of his false representations that he was furthering a fraudulent scheme. See *United States v. Morrow*, 5 Cir., 1976, 537 F.2d 120, 126. He did so in association with Van Note, the principal orchestrator of the scheme. It was not necessary that Netterville know of all facets of the scheme or know all of the other conspirators. *United States v. Rodriguez*, 5 Cir., 1975, 509 F.2d 1342, 1348. Netterville's conscious falsehoods went beyond "mere association" and the jury correctly found that he knew of the scheme and wilfully acted to further it. Once a defendant becomes associated with a conspiracy he is responsible for all acts of the conspiracy, *United States v. Dearden*, 5 Cir., 1977, 546 F.2d 622, 625, even though the acts occurred before or after his association with the conspiracy, *id.*; see *United States v. Heathington*, 5 Cir., 1977, 545 F.2d 972, 973.

In sum we find that the jury was justified in finding that a conspiracy existed and that Watkins, Chambers, Thatcher and Netterville each knew of the scheme and wilfully acted to further it and that the mails were used in execution of the scheme. We therefore affirm the conviction of each appellant under Count 13 of the indictment.

Speedy Trial

All four appellants appeal the trial judge's denial of their pretrial motion to dismiss for lack of speedy trial. The trial judge heard the motion at length, taking testimony from the appellants, their lawyers, the prosecutor, and other witnesses, and determined that under the circumstances dismissal was not required. We have carefully reviewed the transcript of the motion hearing and agree with the conclusion of the trial judge that the appellants were not denied their right to a speedy trial, and that their motion to dismiss on this ground should have been denied.

The due process clause of the fifth amendment protects defendants from unreasonable delay preceding commencement of prosecution. The sixth amendment protects against unreasonable delay between the commencement of prosecution and trial. We treat the appellants' briefs as raising both issues, and find no merit in them.

Delay preceding prosecution. As to delay preceding prosecution, we have said,

Absent a showing of extreme prejudice amounting to a Fifth Amendment denial of due

process, the commencement of prosecution is controlled exclusively by the applicable statute of limitations.

United States v. Davis, 5 Cir., 1973, 487 F.2d 112, 116.

The pre-accusation delay would constitute a violation of the appellants' due process rights if they could show (1) that they incurred substantial prejudice as a result of the government's delays and (2) that the prosecution had intentionally employed the delay to gain a tactical advantage.

United States v. Avalos, 5 Cir., 1976, 541 F.2d 1100, 1107.

In the present case there is no allegation that prosecution was not commenced within the applicable limitations period. Therefore, in order to prevail on this issue the appellants must show, at least, "extreme prejudice."

The investigation into this case began in October or November, 1972 according to Postal Inspector Teel, who conducted it. The original indictment was returned April 11, 1974. Thus a period of eighteen or nineteen months elapsed between commencement of the investigation and indictment. The indictment charged culpable acts occurring as early as December 16, 1971 so that indictment followed these acts by as long as thirty months. Nevertheless the appellants in their briefs refer to no specific prejudicial factors arising as a result of this delay. The three appellants who appeared at the motion hearing each testified that postal inspectors and police alerted them to the ex-

istence of the investigation almost as soon as it was begun. The tenor of the testimony of these appellants and of their lawyers at the hearing was that they were satisfactorily prepared to proceed at the first trial setting in June, 1974. It is apparent that the pre-indictment delay did not prejudice appellants' preparation of a defense. They do not attempt to show any intentional employment of delay on the part of the government calculated to gain tactical advantage. Thus, the pre-indictment delay did not violate their due process rights under the fifth amendment.

Delay following commencement of prosecution. Next we must determine whether the appellants' sixth amendment rights were prejudiced by the delay between commencement of prosecution and trial. See *Dillingham v. United States*, 423 U.S. 64, 96 S.Ct. 303, 303-04, 46 L.Ed.2d 205 (1975); *United States v. Palmer*, 5 Cir., 1976, 537 F.2d 1287, 1288-89. The Supreme Court has recognized the sixth amendment as "an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself." *United States v. Marion*, 404 U.S. 307, 320, 92 S.Ct. 455, 463, 30 L.Ed.2d 468 (1971), quoting *United States v. Ewell*, 383 U.S. 116, 120, 86 S.Ct. 773, 776, 15 L.Ed.2d 627 (1966). In determining whether the appellants' sixth amendment rights were violated, we are governed by the balancing test of *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). We have said that pursuant to the *Barker* test

the conduct of the prosecution and the defendant is balanced, on an *ad hoc* basis, giving

particular attention to four factors: (i) length of delay, (ii) the reason for the delay, (iii) the defendant's assertion of his right, and (iv) prejudice to the defendant.

United States v. Davis, supra, 487 F.2d at 117. "The test is more suggestive than exhaustive, and this Court has found implicit in *Barker* other factors to be thrown into the balance" including the complexity of the case and the availability of evidence. *United States v. Avalos*, supra, 541 F.2d at 1110.

Length of delay. The length of the delay involved must be sufficient to be "presumptively prejudicial," otherwise "there is no necessity for inquiry into the other factors that go into the balance." *Barker v. Wingo*, supra, 407 U.S. at 530, 92 S.Ct. at 2192. The length of delay is usually computed from the time that financial, social and psychological prejudice may begin to accrue to an accused. *United States v. Marion*, supra, 404 U.S. at 320, 92 S.Ct. at 463; see *Dillingham v. United States*, supra, 423 U.S. at 64-66, 96 S.Ct. at 303-04. The present appellants date their alleged prejudice from the return of the first indictment on April 14, 1974. For present purposes we shall adopt the same date.

Trial commenced on January 26, 1976. All parties waived any speedy trial objection, however, for the period between December 1, 1975 and January 26, 1976.²

² The transcript of the hearing on the motion to dismiss for lack of speedy trial shows that the trial judge herein designated another, older criminal case involving other defendants, for trial on December 1, displacing the present case. The prosecutor found that the next convenient time to assemble all witnesses and make other arrangements in the present case would be late January. All parties agreed to a continuance until January 26, and all agreed to waive any speedy trial complaint as to the period between December 1, 1975 and January 26, 1976.

The length of the delay to be considered is thus April 14, 1974 until December 1, 1975 or 19 months and 2 weeks. Accordingly, there is sufficient delay to require inquiry into the other *Barker* factors.

Assertion of the right. Sixth amendment rights are fundamental in nature so that a failure to assert them does not constitute waiver. *Prince v. Alabama*, 5 Cir., 1975, 507 F.2d 693, 700-701. However, the timeliness and vigor with which the right is asserted may be considered as an indication of whether a defendant was denied needed access to a speedy trial over his objection, or whether the issue was raised on appeal as afterthought. *Barker v. Wingo*, supra, 407 U.S. at 528-29, 534, 92 S.Ct. at 2191, 2194; *United States v. Avalos*, supra, 541 F.2d at 1115. In *Barker* the Supreme Court said that courts may, for example,

attach a different weight to a situation in which the defendant knowingly fails to object from a situation in which his attorney acquiesces in long delay without adequately informing his client, or from a situation in which no counsel is appointed. It would also allow a court to weigh the frequency and force of the objections as opposed to attaching significant weight to a purely *pro forma* objection.

407 U.S. at 529, 92 S.Ct. at 2191.

Thatcher waited to assert his speedy trial right until December 16, 1975; Watkins until January 22, 1976; Chambers until January 21, 1976, and Netterville until January 20, 1976.

At the motion hearing on January 22, 1976, Thatcher's position appeared ambivalent as to whether he would assert deprivation of the right to speedy trial or move for an additional 30-day stay to improve the possibility that Kochs, who was ill, could appear at trial. Finally, saying "we're not claiming any right to speedy trial," Thatcher's attorney moved for the stay. Netterville's attorney said that "Mr. Netterville is essentially in the same position as Mr. Thatcher, needing Mr. Kochs' testimony" and referred to this testimony as a "key to our defense." Netterville did not join Thatcher in moving for an additional stay; nevertheless the attitude of Thatcher and Netterville toward Kochs' testimony may help explain why they did not assert the speedy trial right at an earlier date: they were waiting for Kochs to get well so that he could testify.

Chambers did not make any appearance at the motion hearing and no evidence was adduced on his behalf.

Watkins did appear and present evidence at the hearing. We note, however, that Watkins' motion asserting his speedy trial right, which appears in the record, is dated January 22, 1976 — the same day as the motion hearing.

In short the appellants, although represented by counsel during the entire pendency of this case, failed to assert their speedy trial right until the last possible moment, and then their assertions lacked vigor. We find that the record does not show that

the appellants aggressively asserted that desire for speedy trial which they now urge

has been thwarted. That fact will militate against a claim that speedy trial was denied.

United States v. Avalos, supra, 541 F.2d at 1115.

Reasons for delay. The trial judge at the motion hearing found that the delay between indictment on April 14, 1975 and the second trial date of December 16, 1974 occurred because the case was returned to the Grand Jury for a superseding indictment. The superseding indictment was handed down on June 26, 1974; arraignments under the new indictment took place on September 27. Trial pursuant to the indictment was scheduled for December 16, 1974. The trial judge found that as to this series of events and consequent passage of time there "was no speedy trial problem," that is, that this delay was "justifiable," not "negligent," or "deliberate." See *Barker v. Wingo, supra*, 407 U.S. at 531-33, 92 S.Ct. at 2192-93; *United States v. Avalos, supra*, 541 F.2d at 1111-14. Particularly in light of the complexity of this multi-state conspiracy case and of the number of defendants, we agree that this portion of the delay was justified.

As to the remaining period, that between December 16, 1974 and December 1, 1975, the trial judge found that the December 16 trial date was passed due to the heart attack of defendant Kochs on December 14. The trial judge took into account the complexity of the case and that the case was transferred from one prosecutor to another and finally to a third during that period. The trial judge noted that Kochs' attorney received letters from Kochs' physician to the effect that Kochs was in congestive heart failure and consequently unable to stand trial in June, 1975 and again in August, 1975; and that as of October, 1975 Kochs was still too ill to stand

trial. Again we agree with the trial judge that these circumstances amount to justifiable delay. This delay should not weigh against the government, *United States v. Avalos*, *supra*, 541 F.2d at 1114.

Prejudice to the appellants. The Supreme Court has identified the interests to be protected by the speedy trial right as follows:

(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past.

Barker v. Wingo, *supra*, 407 U.S. at 532, 92 S.Ct. at 2193. None of the four appellants was incarcerated, so that the first interest was not compromised. Additionally, the freedom of all four appellants during the entire pendency of this action allowed each the maximum opportunity to prepare his defense.

Chambers, as already noted, did not appear at the motion hearing and no evidence was adduced in his behalf at the hearing. In his brief on appeal, Chambers refers to the length of time between the first indictment and trial, and observes in a general way that the passage of time "will impair witnesses [sic] memory" and that this may be true of some witnesses whose testimony would have benefitted Chambers.

General allegations of "loss of witnesses and failure of memories is insufficient to establish prejudice." *United States v. Beckham*, 5 Cir., 1975, 505 F.2d 1316, 1319, *cert. denied*, 421 U.S. 950, 95 S.Ct. 1683, 44 L.Ed.2d 104. As to Chambers, then, the record shows no substantial prejudice as a result of the delay between indictment and trial.

Thatcher's brief on appeal asserts that his defense was prejudiced in two ways. First, "Appellant was deprived of the testimony of O.B. Kochs." We have already seen that Kochs suffered a heart attack shortly before the December, 1974 trial setting and, according to his physician, was too ill to stand trial during much of the succeeding year; and he suffered a second heart attack shortly before the trial of the case and was severed. It was not the delay which deprived Thatcher of Kochs, but the unavailability of Kochs which caused the delay. We do not credit this point of prejudice.

Thatcher further argues that "the accurate testimony of the persons involved in the acts, which occurred approximately four years previous to the trial, was denied by the delay." This is a "general allegation of loss of witnesses and failure of memories" and is insufficient to establish prejudice. *United States v. Beckham*, *supra*, 505 F.2d at 1319.

Thatcher's final allegation of prejudice involves what *Barker* characterizes as the "anxiety and concern of the accused" which the protection of the sixth amendment is intended to minimize. Thatcher claims to have lost his job and to have been unable to secure another; to have suffered severe financial hardship;

and to have experienced severe family problems as a result of his indictment. These are complaints of the sort "present to some degree in virtually every case" and do not necessarily amount to actual prejudice, *United States v. Avalos, supra*, 541 F.2d at 1115, because they are the result of the indictment itself and not of the delay which followed the indictment. Prejudice may accrue when such suffering is "extended" by delay. *United States v. Beckham, supra*, 505 F.2d at 1320. Thatcher's tardiness and lack of vigor in asserting his speedy trial right, however, are inconsistent with his present complaints. His long silence "suggests that any hardships he suffered were either minimal or caused by other factors." *Palmer v. United States, supra*, 537 F.2d at 1288. Taking all of Thatcher's problems into account in light of his silence we find that they did not rise to the level of substantial actual prejudice.

Watkins asserts that a witness, Joseph Kennedy, became unavailable to him because of the delay. He does not relate what evidence Kennedy would have offered. At the motion hearing, Watkins testified that despite retaining counsel in April, 1974 and despite being aware of the necessity of a defense during the entire pendency of this matter, he failed to keep in touch with Kennedy although he did keep in touch with other witnesses. Watkins testified that he realized that Kennedy might be helpful to him only a few weeks before trial. We cannot attribute the loss of this witness to delay.

Watkins further asserts that he was prejudiced by an unfavorable newspaper article which appeared shortly after his first indictment; and that shortly after the

second indictment, as a result of his involvement in this matter, his wife divorced him. We agree with the trial judge that these circumstances occurred quickly, as a result of the indictment and were not the result of any delay.

Watkins finally asserts that the long pendency of this action has caused him severe financial and emotional strain, and that his social relationships have been impaired. Again, these problems were not caused by the delay but by Watkins' involvement in a criminal action. Like Thatcher, Watkins failed to assert his speedy trial right early or vigorously. As with Thatcher, we find that the record does not indicate that Watkins' asserted troubles amounted to "substantial actual prejudice."

Netterville makes the strongest case among the appellants of prejudice to his defense. Netterville relates that one witness, Jameson Brinkmeyer, died during the pendency of this matter and that two others, Lynn Rountree and Ricky Cheung, became unavailable.

Netterville asserts that Brinkmeyer would have testified to a conversation in which Van Note allegedly implied or stated that he had "duped" Netterville into playing a role in the conspiracy. Van Note could have been questioned about this conversation, but was not. Further, Brinkmeyer died during the period for which the speedy trial right was waived by all parties.

Netterville contends that Rountree, an ICU dealer, would have testified that only through Netterville's efforts did Rountree receive his inventory; and that

Netterville told him that he had quit working for ICU because he "didn't like the way they were operating the company." Another witness, Shari Martin, testified concerning Netterville's resignation. Van Note could have been questioned concerning Netterville's efforts on Rountree's behalf. Thus, Rountree's testimony would have been cumulative. Further, Netterville testified that in 1975 he was in touch with Rountree; at that time he knew he was going to trial, and was represented by counsel, yet he failed to keep track of this witness. Netterville offers nothing to indicate that the delay caused him to lose touch with Rountree; he shows only that during the delay contact was lost.

Finally, Netterville asserts the loss of Ricky Cheung, his former employer, who Netterville believes returned to Hong Kong during the delay. According to Netterville, Cheung would have testified to a conversation in which Van Note recruited Netterville to manage the "Don Mason Service Company," which served as the basis for duping Netterville into playing the part of "Don Mason." Extensive testimony by Netterville and exhibits tending to support Netterville's theory, going far beyond Cheung's alleged potential testimony, were admitted at trial. Further, the conversation to which Cheung would have testified took place before Netterville undertook his duties as "Don Mason." It would therefore, not contradict evidence of Netterville's knowing complicity once he actually began acting as "Mason." In light of this, we cannot say that Cheung's testimony was "critical" to Netterville's defense, *United States v. Scallion*, 5 Cir., 1976, 533 F.2d 903, 912.

In sum, we note that the absence of the witnesses does not appear to have been critical to Netterville's defense.

The balance. Having evaluated the assertions of the appellants as to the four *Barker* factors, we weigh them to determine whether such prejudice accrued to any of the appellants of such a nature as to deprive them of their right to a speedy trial.

We conclude that the trial judge was correct in denying the appellants' motion to dismiss for lack of a speedy trial.

Other Issues

Netterville and Thatcher argue on appeal that the trial judge erred in giving the following instruction to the jury:

The law presumes that every man intends the natural and probable consequences of his own knowing acts. Wrongful acts knowingly or intentionally committed can neither be justified nor excused on the ground of innocent intent. The color of the act determines the complexion of the intent. The intent to injure or defraud can be presumed when the unlawful act which results in loss or injury is proved to have been knowingly committed. It is a well settled rule that the intent can be presumed and inferred from the results of the action.

Netterville argues vigorously that to instruct that intent is to be "presumed" rather than that it is inferable,

from actions of the accused, amounts to plain error. He points out that intent is a critical element of the crime charged, and that his defense was "pitched" on lack of intent. It is true that we have disapproved use of "presumptive" instructions, see *United States v. Wilkinson*, 5 Cir., 1972, 460 F.2d 725, 733; but their use is reversible error only when they mislead the jury to the extent that they tend to reverse the burden of proof in the jury's mind, *id.* We must view the instruction complained of in the context of the full charge given the jury, see, e. g., *United States v. Green*, 5 Cir., 1974, 494 F.2d 820, 829, *cert. denied*, 419 U.S. 1004, 95 S.Ct. 325, 42 L.Ed.2d 280; *United States v. Cisneros*, 5 Cir., 1974, 491 F.2d 1068, 1072. The complained-of instruction must remain uncured in the context of the full charge to require overturning the jury's verdict, *Poole v. Georgia*, 5 Cir., 1977, 551 F.2d 683, 685; *United States v. Wilkinson*, *supra*, 460 F.2d at 732.

We have reviewed the trial judge's instructions in this case and find that in the context of the entire charge the proper burden of proof was made unmistakably clear.³ See *Poole v. Georgia*, *supra*, at page

³ For example, in addition to the complained-of language, the trial court also charged the jury as follows:

So the presumption of innocence alone is sufficient to acquit the defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt from all the evidence in the case.

The burden is on the Government to prove each of these essential elements of the offenses charged beyond a reasonable doubt.

As stated before, the burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged; the law never imposes upon a defendant in a criminal case the burden of duty or calling any witness or producing any evidence.

685. In the present case, the words complained of were not so misleading in the context of the entire charge as to require overturning the jury's verdict.

Thatcher and Watkins complain on appeal that the trial judge erroneously admitted testimony concerning alleged offenses extraneous to the indictment. The allegedly extraneous offenses complained of related to sales which were attempted and made pursuant to the DMI/ICU scheme but not charged in the indictment. To allow such evidence was not error; "the government is not limited to overt acts pleaded in proving a conspiracy. It may show other acts of the conspirators occurring during the life of the conspiracy." *United States v. Perez*, *supra*, 489 F.2d at 70.

Finally, Chambers argues that the trial court erred in allowing the government to examine witnesses in an impermissibly suggestive manner.⁴ We have examined the record and find no objection to the government's examination by Chambers at trial; therefore, we could reverse on this issue only if we could find that to allow the prosecutor's questions amounted to plain error within the meaning of Rule 52(b), F.R.Crim.P. We find no error of this magnitude, and thus find this issue to be without merit.

Fraudulent intent is one of the essential elements of the offense of which the defendant is charged, and such intent must be clearly proved or inferred from the evidence beyond a reasonable doubt to warrant a conviction.

⁴ These assertions refer to the evidence that some DMI advertisements instructed interested readers to telephone a "Mr. Byrd" at DMI. Several witnesses testified that they talked by telephone with someone at DMI who identified himself as Mr. Byrd. Chambers complains that the prosecutor, through his manner of questioning, attempted to insinuate that Chambers, whose middle name is Byrd, was in fact this "Mr. Byrd."

In conclusion, we have examined the various contentions of the appellants and for the reasons given, find each to be without merit. Accordingly, we affirm the judgment of the trial court.

AFFIRMED.

In the United States Court of Appeals
for the Fifth Circuit

No. 76-1670

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

WILLIAM NETTERVILLE, GERALD L. THATCHER,
ROBERT DOUGLAS WATKINS, and DONALD BYRD
CHAMBERS,
Defendants-Appellants.

Appeals from the United States District Court for the
Northern District of Texas

ON PETITIONS FOR REHEARING
(July 8, 1977)

Before COLEMAN, AINSWORTH and INGRAHAM,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby Denied

ENTERED FOR THE COURT:

/s/ ROBERT A. AINSWORTH, JR.
United States Circuit Judge

MOTION TO STAY MANDATE

In the United States Court of Appeals
Fifth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee
versus No. 76-1670

ROBERT DOUGLAS WATKINS,
Defendant-Appellant

Defendant-Appellant, ROBERT DOUGLAS WATKINS, by his attorney, comes now and moves this Court to issue its order staying issuance of the mandate in this appeal, pending application for a writ of certiorari, under the provision of 28 USC § 2101 (f) and Rule 41 (b) of the Federal Rules of Appellate Procedure, and continuing Defendant-Appellant on bail, on the terms and conditions heretofore ordered, pending determination of such application.

The Application for a writ of certiorari will be substantially based on the following grounds:

I.

The Court of Appeals determined by inference that Defendant-Appellant, being vice-president of both companies and an incorporator of ICU, must have been aware that the merchandise sold under contract was not being shipped to some dealers, because his companies lacked the necessary funds. Having this knowledge, Defendant-Appellant continued to approve additional dealer contracts and buy-back agreements as late as August of 1972. On these inferences, this Court concluded that Watkins knew of the scheme to defraud and wilfully acted in a manner calculated to make it succeed.

This finding of guilt on the basis of inferential evidence was error in the Court below and the finding should have been reversed by the Court of Appeals.

II.

The Court of Appeals overlooked the point that in the prosecution for a conspiracy to use the mails to defraud, intent to use the mails was a necessary element. The Court of Appeals found that a conspiracy existed and that Watkins, Chambers, Thatcher and Netterville each knew of the scheme and wilfully acted to further it; and that the mails were used in execution of the scheme. However, the Lower Court failed to find the Defendant-Appellant's intent to use the mails in furtherance of the conspiracy. This omission to prove intent to use the mails to defraud renders the conviction of Defendant-Appellant under Count 13 of the indictment a nullity. The scheme to defraud alleged in Counts 1 through 12 of the indictment is baseless if the charge of conspiracy is nullified.

III.

Defendant-Appellant was indicted April 11, 1974 and arraigned May 3, 1974. The case was set for trial on June 10, 1974. Trial was postponed by the prosecution for the purpose of obtaining a re-indictment of the defendants. The defendants were arraigned September 27, 1974 and the case was set for trial December 16, 1974. The case was continued and re-set for December 1, 1975, passed again and finally set for January 26, 1976. This delay caused a serious impairment of his ability to properly prepare and present his defense of the accusations made against him, and resulted in Defendant-Appellant's loss of his constitutional right to a speedy trial.

WHEREFORE, DEFENDANT-APPELLANT PRAYS that this Court make and enter an appropriate order staying the issuance of the mandate in this cause pending final determination upon his application for writ of certiorari.

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[Filed: July 15, 1977]

36a

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-1670

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WILLIAM NETTERVILLE, GERALD L. THATCHER,
ROBERT DOUGLAS WATKINS, and DONALD BYRD
CHAMBERS,
Defendants-Appellants.

Appeals from the United States District Court for the
Northern District of Texas

✓ ORDER:

The motion of APPELLANTS, NETTERVILLE and WATKINS for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED. See Fifth Circuit Local Rule 15, as amended January 11, 1972.

The motion of APPELLANTS, NETTERVILLE and WATKINS for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including August 7, 1977, the stay to continue in

37a

force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ JAS. P. COLEMAN
UNITED STATES CIRCUIT
JUDGE

[Filed: Jul. 28, 1977]